Editor's note: Appealed – reversed, sub nom. Ahrens v. Andrus, Civ.No. 79-166 (D.Wyo. July 23, 1980, aff'd, No. 80-1901 (10th Cir. Oct. 13, 1982) 690 F.2d 805

THOMAS R. FLICKINGER, WILLIAM S. FLICKINGER, ET AL.

IBLA 78-154, etc. Decided March 16, 1979

Appeal from decisions of the Wyoming State Office, Bureau of Land Management, rejecting offers to lease for oil and gas. W 60417, etc.

Affirmed.

1. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Applications: Drawings

   Where a drawing entry card is submitted in a simultaneous oil and gas lease drawing and signed by multiple offerors, the offer is properly rejected if even a single offeror fails to enter the date of his signature on the drawing entry card.

2. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Applications: Drawings

   The requirement set forth in 43 CFR 3112.2-1(a) (1977) that a drawing entry card be fully executed is not vague or unclear. Hence, a DEC signed by multiple offerors is properly rejected if even a single offeror fails to enter the date on the drawing entry card.

3. Oil and Gas Leases: Generally--Regulations: Interpretation

   The maxim, expressio unius est exclusio alterius, will not be utilized to contradict or vary a clear expression of legislative intent.

4. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Applications: Drawings

   The date of each signature on a drawing entry card is important, because it shows that on that particular date, the offerors, by their respective signatures, certify, as to each, all the statements made on the card.

5. Administrative Procedure: Generally--Appeals--Oil and Gas Leases: Generally--Oil and Gas Leases: Noncompetitive Leases--Rules of Practice: Appeals: Generally--Rules of Practice: Appeals: Standing to Appeal

   When a State Office rejects the offer of a first-drawn applicant in a drawing under the simultaneous oil and gas leasing program, an appeal by the applicant raises the issue of his qualifications to hold the lease. The qualifications of the second-drawn applicant are irrelevant until such time as the offer of the first-drawn applicant is rejected and all his avenues of appeal are exhausted. However, it is not improper for BLM to name the second-drawn applicant as an adverse party in a decision rejecting the first-drawn applicant.

APPEARANCES: James W. McDade, Esq., McDade and Lee, Washington, D.C., Craig R. Carver, Esq., Head, Moye, Carver & Ray, Denver, Colorado, for appellants.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Cases set forth in the Appendix have been consolidated in this appeal because of the similarity of the material facts and issues of law.

Each of the appellants herein received first priority in various drawings conducted by the Wyoming State Office, Bureau of Land Management (BLM), for the award of simultaneous oil and gas leases on public lands. Appellants' offers to lease were made on the standard drawing entry card (DEC) appropriate for this purpose.

BLM rejected each of appellants' DEC's, however, for failure to fully complete the card in accordance with 43 CFR 3112.2-1(a)

(1977). 1/ BLM's notice of rejection also included a reference to Thomas V. Gullo, 29 IBLA 126 (1977), a case decided by the Board on February 23, 1977.

The defect which BLM found was the failure of multiple offerors to date the DEC submitted in the drawing. Each of the offers herein was prepared by a private filing service which affixed facsimile signatures of multiple offerors to the appropriate DEC and entered the date on the DEC. The date was entered only once on the DEC, although the DEC contained facsimile signatures of more than one offeror. It is this defect which caused BLM to reject appellants' offers. We affirm.

[1] Gullo, supra, held that where a drawing entry card is submitted in a simultaneous oil and gas lease drawing and signed by multiple offerors, the offer is properly rejected if even a single offeror fails to enter the date on the drawing entry card.

Counsel for appellants sets forth three grounds for appeal:

I. Thomas V. Gullo, supra, is inapplicable to appellants because of factual distinctions.

II. Ambiguity in the appropriate regulations precludes BLM from disallowing statutory preference rights.

III. Gullo is an erroneous statement of the law and must be reversed.

The facts of the Gullo case are similar to those at hand. In Gullo, a DEC bearing the signatures of two offerors was selected with first priority in a simultaneous oil and gas lease drawing. A date was entered in the appropriate place on the DEC by one offeror, but no date was entered by the second offeror. BLM rejected the DEC, and thereafter the two offerors submitted an affidavit stating that both signatures had been signed on the same day, as set forth on the DEC.

Our opinion in Gullo recited well established law in the area of simultaneous oil and gas leasing. Strict compliance with the regulations is necessary. Robert J. Burkhill, 28 IBLA 76 (1976); Amy H.

_____

1/ The relevant portion of this regulation is set forth:

"§ 3112.2-1 Offer to lease.

"(a) Entry card. Offers to lease such designated leasing units by parcel numbers must be submitted on a form approved by the Director, "Simultaneous Oil and Gas Entry Card" signed and fully executed by the applicant or his duly authorized agent in his behalf. The entry card will constitute the applicant's offer to lease the numbered leasing unit by participating in the drawing to determine the successful drawee."

Hawthorn, 27 IBLA 369 (1976). Even minor deviations and omissions in the information required are sufficient to warrant the rejection of the offer. Raymond F. Kaiser, 27 IBLA 373 (1976). Thus, the incomplete entry of the date has been held a proper reason for rejection of the offer. Burkhill, supra (year omitted). Helen E. Ferris, 26 IBLA 382 (1976) (day of the month omitted).

In John R. Mimick et al., 25 IBLA 107 (1976), cited by appellants, we noted that 43 CFR 3112.2-1 requires a DEC to be "fully executed." We further noted that 39 FR 24523 (1974) contained an admonition to the effect that "[f]ailure to complete any part of the card will disqualify the applicant from participation in the drawing * * *."

Appellants attempt to distinguish Gullo by pointing out that no subsequent affidavits were required in the present cases to inform BLM of additional date(s) of signature. In support of this point, appellants refer to certain "statements" of the offerors and filing service which set forth the scope of the authority of the filing service to act on behalf of the offerors. These statements accompanied the DEC submitted to BLM and, according to appellants, established that the signatures on any given DEC were affixed by a single entity. Appellants would have us conclude that all signatures were affixed on a single day (as set forth in the DEC) simply because all signatures were affixed by a single entity. While this argument is appealing, its conclusion does not follow from the stated premises.

Simply put, there is nothing in the "statements" to establish that all signatures were affixed to the DEC on the same day. As in Gullo, BLM is unable to determine the date of signing by those offerors who failed to set forth a date on their DEC. Appellants have failed to distinguish Gullo.

[2] Appellants' second argument on appeal is addressed to the regulation (43 CFR 3112.2-1(a) (1977)) cited by BLM in rejecting the DEC at issue. Appellants claim that the regulation is ambiguous in requiring an agent who affixes multiple signatures to affix multiple dates.

A. M. Shaffer, 73 I.D. 293 (1966) is freely cited by appellants:

> In considering whether regulations should be interpreted to the detriment of persons seeking oil and gas leases who would have a statutory preference to a lease, it is true, as appellants have contended, that the regulations should be so clear that there is no basis for the applicant's noncompliance, and if there is doubt as to their meaning and intent such doubt should be resolved favorably to the applicants.

(at p. 298).

The allegation of ambiguity has been before this Board in Mimick, supra. Therein we stated at 108: "We do not agree that the intent of 43 CFR 3112.2-1 (1977) is vague and unclear. Appellants assert that the regulation does not explicitly require that the card be dated. The regulation does, however, state that the card must be 'fully executed.'"

We see no reason to depart from this position. The phrase "fully executed" is sufficiently clear to afford appellants no basis for noncompliance with the regulations. 2/

[3] Appellants' third argument on appeal urges this Board to overrule its holding in Gullo. A number of alleged shortcomings are called to our attention.

Appellants assert that the maxim, "expressio unius est exclusio alterius," prevents BLM from requiring multiple offerors to set forth multiple dates. The argument is made that the existence of specific, mandatory instructions re filing fees, corporate qualifications, and parties in interest precludes BLM from exacting equally strict requirements in other areas.

The maxim cited by appellants is subject to numerous limitations. Dickey v. Raisin Proration Zone, 24 Cal. 2d 796, 151 P.2d 505, 513 (1944) sets forth one such limitation applicable to the present case. The maxim, expressio unius est exclusio alterius, will not be utilized to contradict or vary a clear expression of legislative intent. Our holding above to the effect that 43 CFR 3112.2-1(a) (1977) is a clear expression of legislative intent supporting BLM's action in rejecting the DEC precludes our application of the maxim offered by appellants.

[4] Appellants also attack Gullo by claiming that the placement of multiple dates on a DEC is unnecessary because the date itself is irrelevant. Lengthy discussion of contract law is set forth in appellants' brief to establish this point. Without entering into the merits of appellants' argument on contract law, we restate the importance of the placement of a date on a DEC. The date is important because it shows that as of a particular date, the offerors, by their respective signatures, certify, as to each, all the statements made on the card. Mimick, supra, at p. 109, Ray Flamm, 24 IBLA 10 (1976). The importance of this certification is underscored by the admonition at the bottom of the DEC: "Title 18 U.S.C., Section 1001, makes it a crime for any person knowingly and willfully to make to any department or agency of the United States any false, fictitious or fraudulent statements or representations as to any matter within its jurisdiction."

2/ We further note that the instructions printed on the DEC at issue require that the card be "fully completed."

Further argument is made by appellants that a single date, affixed on a card executed by multiple offerors, applies to all offerors exactly as if multiple dates were provided. Once again, appellants' arguments are based in contract law. We also note that appellants cite us to no legal authority in support of their position, but instead refer to a "commonly accepted practice." We need not enter contract law. It is enough to restate our position as set forth in Mimick and Flamm, supra, that is, each signature must show the date of its execution.

Appellants' final salvo on appeal is the allegation that the Gullo decision is an implied and unwarranted reversal of longstanding Department practice and law. Appellants refer us to Thor-Westcliff Development, Inc. v. Udall, 314 F.2d 257 (1963), which emphasized full public participation under the Mineral Leasing Act, 30 U.S.C. § 226 (1976). Appellants' concern that the present lottery system be administered in such a way that nonprofessionals may participate is well-taken. We do not feel, however, that the requirement that each offeror enter a date on his DEC will restrict participation by the public. Judge Skelly Wright's concluding remarks in Thor-Westcliff Development, Inc., supra, on the need for regulation is on point:

> The history of the administration of the statute [30 U.S.C. § 226] furnishes compelling proof, familiar to the membership of Congress, that the human animal has not changed, that when you determine to give something away, you are going to draw a crowd. It is the Secretary's job to manage the crowd while complying with the requirements of the Act.

(at p. 260).

We hold that the decisions of the Wyoming State Office rejecting appellants' DEC's for failure to comply with the applicable regulation, 43 CFR 3112.2-1 (1977), are proper and hereby affirm.

[5] The decisions of the Wyoming State Office at issue here required appellants, in the event of an appeal of the State Office decision, to serve a copy of the appeal on the next qualified drawee. Appellants ask this Board to rule that the next qualified drawee is not an adverse party within the meaning of 43 CFR 4.413 (1977). We agree. This regulation states:

> The appellant must serve a copy of the notice of appeal and of any statement of reasons, written arguments, or briefs on each adverse party named in the decision appealed from * * *. Failure to serve within the time required will subject the appeal to summary dismissal.

When a State Office rejects the offer of a first drawn applicant, an appeal by the applicant raises the issue of his qualifications to

hold the lease. The qualifications of the second drawn applicant are irrelevant until such time as the offer of the first drawn applicant is rejected and all his avenues of appeal are exhausted.

In Dorothy Bassie, 59 I.D. 235, (1946), in an analogous situation involving an applicant (Kirchner) for a noncompetitive, over-the-counter oil and gas lease the Department held:

> Qualified applicants who filed applications prior to Kirchner's would be entitled to leases regardless of the merits of his application. Whether they would be issued leases would depend entirely upon the merits of their own case. Only if their applications should be rejected for some defect would Kirchner's application be entitled to consideration.

(at p. 237). See also Sun Oil Company, 67 I.D. 298 (1960).

Both Bassie and Sun stress that the junior offeror (number 2 drawee) is not entitled, as a matter of right, to notice of actions taken on the prior offer (number 1 drawee). However, neither Bassie nor Sun interdict naming the number 2 drawee (and the number 3 drawee) as an adverse party when BLM determines that the number 1 drawee may not be qualified to receive the oil and gas lease sought.

It is pertinent to note that both Bassie and Sun were decided in situations which arose before the Mineral Leasing Act Revision of 1960, 74 Stat. 785, September 2, 1960, was enacted. This Act introduced protection to bona fide purchasers of oil and gas leases from cancellation of their leases where such were improvidently issued contrary to the provisions of the Mineral Leasing Act, as amended, 30 U.S.C. § 226 (1976). We do not have to reach the issue of whether it is now mandatory to name the other drawees as adverse parties in the circumstances which gave rise to these appeals; we merely state that it is not improper for BLM to name the number 2 drawee as an adverse party.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

_____
Douglas E. Henriques
Administrative Judge

I concur:

_____
James L. Burski
Administrative Judge

APPENDIX

IBLA 78-154 Thomas R. Flickinger, William S. Flickinger W 60417
78-155 Helen D. Coen, Holly C. Goodbody, Betty S. Jahns, Catherine Hills, Donna A. Faherty W 60581
78-156 Jack P. Corsi, Oscar H. Ziemba W 60582
78-157 Roy W. Stewart, John V. Warner W 61212
78-159 Peter R. Brant, Jon Arney W 61671
78-160 Martin Mattler, Victoria Kulis W 61728
78-161 Benjamin A. Oxnard, Jon W. Yoskin II W 61735
78-173 Harry Alatchanian, Seymour Goodman W 62100
78-191 Benjamin A. Oxnard, Jon W. Yoskin II W 61817
78-262 Helen D. Coen, Holly C. Goodbody, Betty S. Jahns, Catherine Hills, Donna A. Faherty W 62383
78-483 Robert J. Ahrens, Robert A. Crowe, Judythe R. Maugh W 61236
78-508 Judith M. Nicolazzi, Richard H. Steding III, William A. Vetter W 60430

ADMINISTRATIVE JUDGE FISHMAN CONCURRING SPECIALLY:

I must reluctantly concur in the result rendered in the main opinion, even though I am not insensitive to the kind treatment afforded to my dissenting opinion in John R. Mimick, 25 IBLA 107, 111 (1976), by appellants' Statement of Reasons. 1/

If I were considering for the first time the issue raised in Mimick, i.e., whether the failure to date a drawing entry card is a fatal defect to the offer, I would most definitely adhere to my views enunciated in my dissent in Mimick. I respectfully suggest that it is pure casuistry to place any significance on the presence or absence of a date the offeror's signature was inscribed. An offeror is in essence certifying that he is a citizen of the United States and that his oil and gas holdings on federal public lands or acquired lands discretely, do not exceed 246,080 acres in any one State other than Alaska. 30 U.S.C. § 184(d)(1) (1976). 2/ This has been the limitation since the enactment of the Act of September 2, 1960, 74 Stat. 781, 786. Since that date I have yet to see a single case where that maximum acreage holding arguably was breached. To put it baldly, the date on an offeror's drawing entry card appears to be of highly dubious value.

It is true that intermittent and spasmodic gleams of rationality have been permitted to breach the mechanistic and pavlovian adjudication of oil and gas offers. See, e.g., Clayton Chessman, 34 IBLA 263 (1978); Douglas Steele, 34 IBLA 344 (1978); J. C. Davis, 35 IBLA 92 (1978); James L. Harden, 35 IBLA 128 (1978); Geraldine McCarthy, 37 IBLA 323 (1978). Nevertheless, the main thrust in oil and gas adjudication has been to insist on absolute compliance; failure to meet that standard invalidates an offer, despite the absence of any rational consideration for the requirement. See, e.g., Mary Nan Spear, 31 IBLA 386 (1977); Duncan Miller, 29 IBLA 1 (1977).

1/ Page 23 of the Statement of Reasons recites in part as follows:

"This appeal emphasizes with great clarity the wisdom contained in Judge Fishman's Mimick dissent. As he pointed out, the process of the Board's decisions in this area is leading to a 'reductio ad absurdum' and a 'mechanistic, if not pavlovian, treatment of 43 CFR 3112.2-1.' He pleaded for 'at least a minimal degree of rationality' to 'be permitted to permeate the adjudicatory process,' and he argued that 'although we have ruled to the contrary in recent decisions, we are not obliged to put the gloss of approval upon our errors.' He concluded by warning that 'the majority opinion unwarrantedly compels a harsh result, which will impel the same conclusion for even more minute variances.'"

2/ This subsection prescribes two leasing districts for the State of Alaska. The limitation is 300,000 acres for each district. Holdings embrace "oil and gas leases (including options for such leases or interests therein)."

I suppose the highly competitive nature of the oil and gas business has made administrators loath to undertake determinations of miniscule and harmless errors. Mechanistic treatment avoids possible calumny as to favoritism or other unfair consideration. Consistency seems to be our major goal, as pointed out below.

The hard fact remains that since Mimick, this Board has adhered to the majority opinion therein in Anchors and Holes, 33 IBLA 339 (1978). I have authored opinions consistent with that view in William E. Riggs, 36 IBLA 403 (1978), and Jack L. MacDowell, 34 IBLA 202 (1978). As recently as November 29, 1978, the Board reiterated its view that failure to date a drawing entry card is fatal to the vitality of an offer. Theodore R. Kuhn, 38 IBLA 135 (1978). On this precise point the Board has not waivered and I know of no compelling public interest factor warranting a change in our position, clearly enunciated in Mimick on June 7, 1976. Mimick v. Kleppe, Civ. No. 76-0-240 (D. Neb.), was dismissed without prejudice on December 21, 1976. Cf. Walter M. Sorensen, 32 IBLA 345 (1977), aff'd Civ. No. 77-250 (D. Wyo. September 12, 1978). In Sorensen the absence of the day in a date given as "2/77" rendered the drawing entry card defective.

_____

Frederick Fishman
Administrative Judge